Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1417

MAURICE P. FOLEY COMPANY, INC.
and
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioners,

v.

JAMES BALDERSON
and
DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Maurice P. Foley Company, Inc., and Hartford Accident and Indemnity Company pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 16, 1977, and the order from that same Court of January 12, 1978, denying petitioners' Petition for a Rehearing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears in the Appendix hereto (3a) as do the order denying the Petition for Rehearing (1a), the decision of the Benefits Review Board, U.S. Department of Labor (11a), and the decision and order of the Administrative Law Judge, U.S. Department of Labor (20a).

JURISDICTION

The Administrative Law Judge, U.S. Department of Labor, had jurisdiction under 33 U.S.C. §901, *et seq.*, and 33 U.S.C. §919 in particular. Jurisdiction for review by the Benefits Review Board, U.S. Department of Labor, is found in 33 U.S.C. §921, as is that for the United States Court of Appeals for the District of Columbia Circuit.

The judgment of the Court of Appeals was entered on December 16, 1977, and a timely Petition for Rehearing was filed on December 30, 1977. A denial of the Petition for Rehearing by that Court was entered on January 12, 1978, and this Petition for Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where an employee has a pre-existing permanent disability (chronic irreversible asthma, bronchitis and emphysema) at the time he is hired by a subsequent employer, in order for that disability to be manifest within 33 U.S.C. §8(f) so as to qualify for second injury fund treatment, must there be actual employer knowledge of same, and, if so, to what extent?

2. Where the Administrative Law Judge (ALJ), sitting as the fact finder, erroneously requires that the employee's previous disability under 33 U.S.C. §8(f) be of an economic nature, thereby excluding consideration of the workers' pre-existing medical condition, can his decision that said disability was not manifest be considered as having the quality of substantial evidence?

STATUTES INVOLVED

United States Code, Title 33:

§908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

* * *

(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subdivision (c) (1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred

and four weeks, whichever is the greater. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subdivision (c) (1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in

section 944 of this title.

§921. Review of compensation orders – Effectiveness and finality of orders.

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(b) (1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

(2) For the purpose of carrying out its functions under this chapter, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the

hearing record. The findings of fact in the decision under review of the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer and carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

Court of Appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order

of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage. * * * * * * * * * * * * * * * * *

§944. Special fund - Establishment; administration; custody; trust.

(a) There is established in the Treasury of the United States a special fund. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

Disbursements; bond of custodian

(b) The Treasurer is authorized to disburse moneys from such fund only upon order of the Secretary. He shall be required to give bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller

General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

Payments into fund

(c) Payments into such fund shall be made as follows:

(1) Whenever the Secretary determines that there is no person entitled under this chapter to compensation for the death of an employee which would otherwise be compensable under this chapter, the appropriate employer shall pay $5,000.00 as compensation for the death of such an employee.

(2) At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and each carrier or self-insurer shall make payments into the fund on a prorated assessment by the Secretary in the proportion that the totla compensation and medical payments made on risks covered by this chapter by each carrier and self-insurer bears to the total of such payments made by all carriers and self-insurers under the chapter in prior calendar year in accordance with a formula and schedule to be determined from time to time by the Secretary to maintain adequate reserves in the fund.

(3) All amounts collected as fines and penalties under the provisions of this chapter shall be paid into such fund.

Investigations; records, availability; record-keeping; provisions of sections 49 and 50 of Title 15 applicable to Secretary

(d) (1) For the purpose of making rules, regulations, and determinations under this section under and for providing enforcement thereof, the Secretary may investigate and gather appropriate data from the carrier and self-insurer. For that purpose, the Secretary may enter and inspect such places and records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate.

(2) Each carrier and self-insurer shall make, keep, and preserve such records, and make such reports and provide such additional information as prescribed by regulation or order of the Secretary, as the Secretary deems necessary or appropriate to carry out his responsibilities under this section.

(3) For the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of this section, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor.

Authorization of appropriations; property of fund; repayment

(e) There is hereby authorized to be appropriated to the Secretary the sum of $2,000,000 which the secretary shall immediately deposit into the fund. Upon deposit in the fund such moneys shall be treated as the property of such fund. This sum, without additional payments for interest, shall be repaid from the money or property belonging to the fund on a schedule of repayment set by the Secretary: Provided, That full repayment must be made no later than five years from the dateoof deposit into the fund. Each such repayment, as made, shall be covered into the Treasury of the United States as miscellaneous receipts.

Depositories; investments

(f) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the Secretary may designate and may invest any portion of the funds which, in the opinion of the Secretary, is not needed for current requirements, in bonds or notes of the United States or of any Federal land bank.

Limitation of liability

(g) Neither the United States nor the Secretary shall be liable in respect of payments authorized under section 908 of this title in an amount greater than the money or property deposited in or belonging in such fund.

Audit by Comptroller General; finality of payment determinations; credits of disbursing officers

(h) The Comptroller General of the United States shall audit the account for such fund, but the action of the Secretary in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the Secretary for payments made from such fund authorized by the Secretary.

Civil actions for civil penalties

(i) All civil penalties provided for in this chapter shall be collected by civil suit brought by the Secretary. * * * * * * * * * * *

Audit to Congress

(k) At the close of each fiscal year the Secretary shall submit to the Congress a complete audit of the fund.

District of Columbia Code:

"§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

"The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the

term 'employee' shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, §1)

STATEMENT OF THE CASE

On June 9, 1972, respondent James Balderson, a steamfitter, first started working for the Maurice P. Foley Company (Foley). He had been employed as a steamfitter for various employers for almost 23 years. While in Foley's employ, during the erection of the FBI Building in the District of Columbia, he was exposed to various air pollutants which exacerbated a chronic asthmatic and irreversible obstructive pulmonary condition (bronchitis and emphysema) which rendered him permanently and totally disabled after March 7, 1973.

The employer's workmen's compensation carrier, Hartford Accident and Indemnity Company (Hartford) voluntarily paid permanent total disability benefits for 104 weeks from March 7, 1973, onward, under the District of Columbia Workmen's Compensation Act, and then stopped payments, in accordance with 33 U.S.C. §8(f)(1) of the Act, its position being that Mr. Balderson had an existing permanent partial disability prior to his industrial accident with Foley, and thus further benefits for permanent total disability should be paid by the Special Fund as per §8(f)(2) and §44 of the Act.

The evidence presented to the Labor Department Administrative Law Judge (ALJ), on the issue of the manifestness of Mr. Balderson's pre-existing condition, was virtually undisputed and did not require any credibility determination or resolution of conflicting testimony. It showed that the

respondent had had, since early childhood, "asthma attacks" and, in fact, he had been discharged from the armed forces during World War II because of same. During his later work life experience as a steamfitter, he had been exposed to a substantial number of varying pulmonary irritants, and he had frequently been required to seek medical attention for respiratory difficulties.

In September of 1971, eight and one-half months before he began working for Foley, the claimant consulted a pulmonary specialist, Dr. André Laz, and gave him a history of longstanding shortness of breath, wheezing and coughing every day, which had been getting worse. Pulmonary function studies were done the next month, and the diagnosis advanced was severe irreversible chronic obstructive pulmonary disease with respiratory insufficiency (bronchitis and emphysema) and hypercapnea. The patient's acute bronchitis was treated with antibiotics, and his pulmonary problems eventually returned to their previous status of underlying chronic bronchitis and emphysema.

For the balance of 1971 until March 8, 1972, the employee experienced periodic acute respiratory difficulties which were basically treated with medication. On March 8, 1972, because the situation was not getting any better, Mr. Balderson was hospitalized for four days, and marked improvement of his acute condition was noted at the time of discharge.

After his discharge from the hospital on March 12, 1972, the patient was continued on antibiotics, and upon the recommendation of Dr. Laz, he then began using an intermittent positive pressure breathing machine several times a day while at home. While working, Mr. Balderson continued to use medication designed to relieve lung congestion, and he also used a hand operated device on the job called

an Isuprel Nebulizer which forced fine particles of medicine into his lungs.

In early June, 1972, one week after he began working for Foley, and during a period when he admittedly had no problems due to his work exposure, the employee returned to Dr. Laz's office with another acute exacerbation of his pulmonary difficulties. Medication was again prescribed, and although he returned the following month feeling improved, medication was continued. Again these prbblems were not due to his work at Foley.

Dr. Laz testified unequivocally that Mr. Balderson's problems were manifest as of the patient's first visit in September of 1971, and they had remained so throughout June of 1972, the date he was hired by the Foley Company. The doctor related that he could never remember seeing Mr. Balderson when he was not short of breath and that anyone in the room with him could tell he was short of breath – the condition being so obvious that it was capable of being detected even by a non-physician.

Indeed, in the fall of 1971, even before Mr. Balderson began working for Foley, he and Dr. Laz had had a discussion about his chronic obstructive pulmonary disease, and a suggestion was made then for a job change. Between the respondent's first visit to Dr. Laz, and his hiring by Foley, Mr. Balderson missed time from work for prior employers as a result of his respiratory problems on at least nine separate days.

Mr. Balderson himself admitted that at the time of hiring by Foley, the owner of the company and his superintendent, and his foreman, all knew that he was having pulmonary problems, and even after he began working there, both his superintendent and foreman knew that he was using the medication Norisadrene to help him breathe.

After hearing the evidence submitted by the parties, the ALJ rejected the applicability of §8(f) of the Act on three grounds:

1. That the worker did not have an existing *economic* permanent disability when hired (emphasis added);

2. That the disability was not manifest; and

3. That, as a matter of law, the employer where the worker last was exposed to injurious stimuli was liable for the entire award.

On appeal to the Benefits Review Board (Board), the only ground passed on, in affirming the denial of the Special Fund's responsibility, was whether or not, at the time of hiring, the employee's disability was manifest.

Upon further review, the Court of Appeals concluded that there was substantial evidence to support the ALJ's findings, the Board's review of same, and it affirmed. It did note, by way of *dictum*, however, that the ALJ's reliance on the concept that the worker's existing permanent partial disability had to be one of an economic nature was clearly erroneous in light of that Circuit's decision in the case of *C & P Telephone Co. v. Director, Office of Workers' Compensation Programs*, 564 F.2d 503 (D.C. Cir. 1977).

REASONS FOR GRANTING THE WRIT

I

TO RESOLVE CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND OTHER FEDERAL CIRCUITS

MANIFEST/LATENT REQUIREMENT FOR SPECIAL FUND TREATMENT

The decision of the United States Court of Appeals for the District of Columbia Circuit on the manifest/latent Special Fund issue should be reviewed because it is clearly erroneous, in conflict with an earlier pre-amendment decision from the same circuit and with appellate decisions from other circuits. *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Dillingham v. Massey*, 505 F.2d 1126 (9th Cir. 1974); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602 (3rd Cir. 1976); *Nacirema Operating Co., Inc., et al. v. Benefits Review Board*, 537 F.2d 73 (3rd Cir. 1976). In determining that the pre-existing permanent disability of respondent Balderson was not manifest at the time of hiring, the D.C. Circuit has rejected the long-held concept of distinguishing between the manifestness or latency of a pre-existing disability on an objective basis, and it now is requiring not only actual employer knowledge of that disability but also actual employer awareness as to its severity. This is completely contrary to the statute, 33 U.S.C. §8(f), appellate case law from the 3rd and 9th Circuits, and an earlier case from the District of Columbia Circuit.

In *American Mutual Ins. Co. of Boston v. Jones, supra*, 426 F.2d 1263 (D.C. Cir. 1970), while discussing the applicability of §8(f) in the context of a permanent total

disability claim asserted by a laborer with borderline intelligence who had injured his right wrist and hand, it was stated at page 1267:

> "Courts have distinguished between 'manifest' and 'latent' conditions for purposes of apportioning claims between employers and special funds such as the present one. . . . Although some jurisdictions make the question turn upon the employer's actual knowledge of the employee's condition, such a test has obvious practical difficulties in application. Practice under the Longshoremen's Act has followed the more general rule, and sought to define certain classes of disability as 'manifest' or 'latent' without regard to *the employer's actual knowledge of the employee's condition.*
>
> "Clearly, some degrees of mental retardation are so severe that they cannot fairly be characterized as other than 'manifest'. The question is whether appellee's disability was of such degree during the time of his employment. . . . [Footnotes omitted]
>
> "It is sufficient for present purposes that nothing in the record gives any indication that appellee, up to the time of his injuries, showed a sufficient degree of social maladaptation due to limited intelligence that his disability could be fairly classed as 'manifest'." (Italics supplied)

A later decision from the D.C. Circuit in *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), does not detract from the *American Mutual* holding for there the employee had continuously been in the telephone company's employ for at least nine years before she

re-injured her back, and their records were replete with numerous references to on-going back difficulties. Thus the references to actual employer knowledge here must be viewed in that factual context. See footnote 10 in that court's opinion at page 526.

In *Dillingham v. Massey*, 505 F.2d 1126 (9th Cir. 1974), the claimant there suffered a broken hip when he was twelve which resulted in a slightly shorter left leg and minor limp. Despite that handicap, he led a physically active athletic and work life, and his leg condition in no way prevented him from engaging in normal employment. In discussing the non-availability of §8(f) in that context, the Court stated at page 1128:

> "However, Congress did not intend that all pre-existing conditions come under coverage by the Fund, but only those 'manifest' at the time of initial employment. *American Mutual Ins. Co. of Boston v. Jones*, 139 U.S. App. D.C. 269, 426 F.2d 1263, 1267 (1970). An underlying condition which is not manifest to a prospective employer cannot qualify as a previous disability. *United States Fidelity and Guaranty Co. v. O'Keeffe*, 240 F. Supp. 816 (D. Fla., 1962). Thus, the key to the issue is the availability to the employer of knowledge of the pre-existing condition, *not necessarily the employer's actual knowledge of it. American Mutual, supra*, 426 F.2d at 1267.
>
> "The determination of a previous disability's manifestation is a factual one, and a number of factors may come into play. The employee's appearance, medical reports, and work experience are relevant, but the critical element is

> what the employer has available to him when the hiring occurs, should he decide to take notice of it. *Boyd-Campbell Co. v. Shea*, 254 F. Supp. 483 (D. Tex., 1966), is clearly in point." (Emphasis added)

In summarizing the evidence there, the Court observed:

> "The administrative record shows that between the time of claimant's childhood injury and his employment by appellant, he consistently engaged in activities and employment which would lead the average person to conclude that he had no disability." [505 F.2d 1128]

In *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602 (3rd Cir. 1976), employee Aleksiejczyk had had pre-existing diabetes mellitus, hypertension, and cardiovascular disease, which were controlled by medication and which permitted the claimant to perform his usual work duties. The claimant later died from a work-related myocardial infarction.

In reversing the Benefits Review Board which had overturned the ALJ's determination that the worker had had a manifest previous disability making the Special Fund liable, the Court noted at page 609:

> "The latent-manifest test is one method for separating eligible from ineligible employers. In view of the difficulty in providing actual knowledge of the disability, *the test is ordinarily an objective one.* Conditions that are latent rather than manifest to a prospective employer do not qualify as §8(f) disabilities." (Italics supplied)

The Third Circuit then added:

> "If this Court determines that [claimant's] medical history was latent, the Board's order finding against Atlantic & Gulf on the §8(f) issue must be sustained."

A similar reversal of the Board involving employee Fulton who had suffered a heart attack and who had had previous hypertension, an episode of congestive heart failure, and diabetes mellitus, was entered by the Third Circuit in *Nacirema Operating Co., Inc., et al. v. Benefits Review Board, et al.*, 537 F.2d 73 (3rd Cir. 1976).

In addition, two District Court decisions have held §8(f) to be applicable in the context of pre-existing back injuries without any indication that there was actual knowledge of same by the subsequent employer. *Vandever v. Voris*, 147 F. Supp. 447 (D. Tex., 1956), and *Pittston Stevedoring Corp. v. Hughes*, 198 F. Supp. 657 (D. N.Y. 1961).

The foregoing authorities make it abundantly clear that the test to be utilized in the first instance in determining whether a pre-existing disability qualifies for Special Fund treatment is measuring the situation by an objective yardstick; yet the decision from the Court of Appeals here fails to even allude to same, but rather it speaks to the problem by reference to actual employer knowledge and the employer's awareness of the severity of the condition involved. This unannounced and unenvisioned departure from the statute and prior precedent is totally unwarranted.

If, on the one hand, the state of a prospective employee's health and work capabilities are to be judged objectively as the previous authorities clearly suggest, then employer involvement in employee hiring is not critical, and the preparation for the formal hearing and appraisal of the

particular situation is fairly clearcut; but, if actual employee knowledge of the pre-existing disability and the degree of its severity is required, then in order to meet this court imposed burden, intensive screening processes may well have to be employed, including submission of written job applications, pre-employment physical examinations, etc.

The latter requirements, if necessary, may well serve to deprive the handicapped, and particularly the severely handicapped, from obtaining employment which would obviously be contrary to the spirit and intent of the Act. In addition, it could well serve to result in employee misrepresentations of disabilities in job applications for fear of not being hired which would then present substantial questions as to whether or not the employee would be entitled to any benefits if he later were to be hurt on the job. See *Larson, The Law of Workmen's Compensation*, §47.53, 8-201-204.

There are additional reasons militating against requiring actual employer knowledge. There may be collective bargaining agreements which prohibit pre-employment physical examinations or requiring written job applications; and, in addition, the cost factor alone, particularly for small employer concerns, may be prohibitive so that they, in effect, would be being discriminated against because they did not have the financial resources of larger corporate concerns.

Due to the significant ramifications flowing from the holding here, both as respects this case and future cases in the workmen's compensation field under both the national Longshoremen's and Harbor Workers' Act, plus the District of Columbia Act, which incorporates those provisions by reference, per D.C. Code, 1973 §36-501, the opinion herein should be reviewed by this Honorable Court.

The importance of resolving these conflicting viewpoints as to whether an objective yardstick is to be employed in determining whether the claimant's pre-existing condition was manifest or latent or, to put it another way, whether that condition was quiescent, or whether actual employer knowledge of that pre-existing condition is required cannot be understated for it will substantially affect the handling of all future cases under the Special Fund.

II

TO INSURE UNIFORMITY IN ADMINISTRATION OF THE LONGSHOREMEN'S ACT

A second and equally significant reason for this Honorable Court to grant certiorari in this case is that the Special Fund area is one which is now ripe for Supreme Court guidance to insure uniformity in the administration of the Longshoremen's and Harbor Workers' Compensation Act which is national in scope and the District of Columbia Workmen's Compensation Act which incorporates same by reference locally. The only time 33 U.S.C. §8(f) was before the Supreme Court was almost thirty years ago when the case of *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949), was decided.

There, the Court outlined the purpose of the Act's Special Fund provisions, and it explained why the concept of a previous disability should not be limited to pre-existing injuries sustained only in an industrial accident. The question of the need for that disability to be manifest at the time of hiring, or during subsequent employment before any compensable injury occurs, and how any manifest/latent test is to be fashioned and satisfied was not mentioned in *Lawson, supra,* nor has it ever been addressed by the Supreme Court.

It is important to note at the outset that the statute is completely silent concerning same, for it merely requires that "an employee having an existing permanent partial disability suffer injury. . .". The requirement that that condition be manifest rather than latent has been judicially fashioned in an effort to comport with the intent of Congress, and now that there appears to be a spate of varying and conflicting interpretations, it would be eminently appropriate for the Supreme Court, at this time, to discuss and spell out appropriate guidelines and the requirements enabling an employer to qualify for Special Fund consideration.

Aside from the fact that no pronouncement from this Court in this area has been forthcoming since the statute was enacted, the problem is now being acutely aggravated by numerous but divergent views which are currently being espoused by lower courts grappling with that issue. As alluded to in the prior section of this petition, the 3rd Circuit, per *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP,* 542 F.2d 602 (3rd Cir. 1976), and *Nacirema Operating Co., Inc., et al. v. Benefits Review Board, et al.*, 537 F.2d 73 (3rd Cir. 1976), and the 9th Circuit, per *Dillingham v. Massey*, 505 F.2d 1126 (9th Cir. 1974), as well as the pre-1972 amendment case of *American Mutual Ins. Co. of Boston v. Jones,* 426 F.2d 1263 (D.C. Cir. 1970), plus *Vandever v. Voris,* 147 F. Supp. 447 (D. Tex., 1956), and *Pittston Stevedoring Corp. v. Hughes,* 198 F. Supp. 657 (D. N.Y. 1961), all approach that question of the previous disability being manifest or latent from an objective standpoint with no requirement of actual employer knowledge of the pre-existing conditions.

The decision from the District of Columbia Circuit in the present case appears to retreat from or ignore those

holdings and seemingly fashions the need for actual employer knowledge of the infirmity plus the nature and extent of same. Heavy reliance is placed on *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977), but there the employee has been continuously employed for many years, and the employer actually knew of the claimant's long-standing back difficulties.

Further confusion has been engendered from the 8th Circuit by the case of *Duluth, Massabe & Iron Range Railway Co. v. U.S. Department of Labor*, 553 F.2d 1144 (8th Cir. 1977), where a pre-existing osteoarthritic condition of the spine, under the circumstances presented therein, was held not to qualify for §8(f) treatment because of no actual employer knowledge of the manifestness of the claimant's condition.

Finally, in *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977), the claimant had had a pre-existing pseudoarthosis of the back and prior operations pertaining to same. In reversing the Board, which had held that the claimant's condition was latent, and not manifest, the 5th Circuit determined that there was actual employer knowledge of these pre-existing infirmities, and §8(f) was held to be applicable.

From the foregoing authorities it can be easily seen that confusion, conflict, and uncertainty reigns, and thus unless there is a prompt resolution of this ever burgeoning problem in the Special Fund area, there will be a lack of uniformity in the proper handling of claims under the Act. Indeed, the availability of the Special Fund for an employer may well be determined on the fortuitous circumstances of in what state and in which Circuit the injury occurred.

Thus, for example, if the accident in question occurred within the boundaries of the 3rd Circuit or the 9th Circuit, the evidence developed at the formal hearing before the ALJ would approach the §8(f) issue based on an objective test of whether the claimant's pre-existing disability was active or symptomatic (manifest) or was asymptomatic or quiescent (latent). If the identical accident occurred in the District of Columbia, the 8th Circuit or the 5th Circuit, then the record would be developed based on what information the employer actually had available to it at the time of hiring, or subsequent thereto before the industrial accident, and to what extent it had knowledge of the specific malady and seriousness thereof. Such a disparity in approaches should not be perpetuated for it would raise serious equal protection and due process constitutional questions.

III

TO INSURE THE PROPER SCOPE OF JUDICIAL REVIEW WHERE THE REVIEWING BODIES DEPARTED FROM SUPREME COURT PRECEDENT

The Supreme Court has held on numerous occasions, under the Longshoremen's and Harbor Workers' Compensation Act, that where the evidence before the hearing officer permits the drawing of adverse inferences, his determinations as fact finder are to be sustained on appeal unless it is forbidden by law or irrational. *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If the Deputy

Commissioner's findings are supported by substantial evidence, on the record considered as a whole, his decision must be affirmed. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Banks v. Chicago Grain Trimmers Assn.*, 390 U.S. 459 (1968).

On the other hand, the Supreme Court has also held that a reviewing court is not barred from setting aside a Board or appellate decision when it cannot conscientiously find that the evidence supporting that decision, including that opposed to the Board's view, is substantial. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951). The Court has likewise admonished that appellate review is not to be a mere rubber stamping of the Deputy Commissioner's order, and when the evidence in the entire record cannot be considered substantial, the Court is duty bound to reverse. *O'Leary v. Brown-Pacific-Maxon, supra*, 340 U.S. 504 (1951).

In reviewing cases arising under the District of Columbia Workmen's Compensation Act, the Court of Appeals for that Circuit has held that a reversal of the fact finder is in order if there has been a misapplication of the statute to the factual situation involved, or if the decision reveals that it was reached in a manner that cannot be accepted as valid. Where either occurs, the Court is at liberty to reject the ultimate findings or those inferences derived therefrom. *Robinson v. Bradshaw*, 206 F.2d 435 (D.C. Cir. 1953); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); and *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. *en banc* 1968).

It is respectfully submitted that here the Benefits Review Board and Court of Appeals affirmances of the original decision rendered by the ALJ ignore those basic precepts

and are contrary to the foregoing well-settled Supreme Court principles delineating the proper scope of judicial review under the Act.

To begin with the pertinent excerpts from the initial decision emanating from the ALJ clearly reveal a wholly erroneous interpretation of the term "previous disability" as found in §8(f) of the Act. Judge Briggs stated:

> "1. *Section 8(f) is not applicable.* The Benefits Review Board has consistently held that pre-existing conditions 'not shown to be in any way disabling *in an economic sense* (emphasis supplied) prior to the [injury at issue] do not constitute an "existing permanent partial disability" within the meaning of Section 8(f) of the Act.' *Aleksiejczyk v. Atlantic and Gulf Stevedores*, 1 BRBS 541 (1975); *Shillington v. W.J. Jones & Son*, 1 BRBS 191 (1974).
>
> "In *Burke v. Metropolitan Stevedore Co.*, 2 BRBS 94 (1975), the Benefits Review Board stated:
>
> " 'The term "disability", as it is used in section 8(f), includes both an employment-related disability and one unrelated to employment. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949). However, in construing the term "disability" as it is used in Section 8(f), it has been held that "disability" is an economic and not a medical concept. *American Mutual Insurance Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). The record does not support a contention that the claimant was disabled in an economic sense prior to the injury

> which gave rise to this case. Prior physical infirmities suffered by the claimant are merely pre-existing conditions, not previous disabilities, so that Section 8(f), limiting the employer's liability for payment of compensation, does not apply.' "

The rationale and those cited authorities relied on by the ALJ, who was merely following the Benefits Review Board's rulings, have now been deemed to be totally in error according to later appellate court decisions. *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602 (3rd Cir. 1976), reversing *Aleksiejczyk v. Atlantic & Gulf Stevedores, Inc.*, 1 BRBS 541 (1975); *Nacirema Operating Co. v. Benefits Review Board, et al.*, 538 F.2d 73 (3rd Cir. 1976); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977). If the ALJ, therefore, was patently incorrect in his understanding as to what constituted a previous disability, then obviously his consideration of whether that disability was manifest or latent is simiarly impaired, and his ultimate conclusion that the disability was not manifest should not be sustained. How can one conscientiously affirm a fact finder on the basis of there being substantial evidence to support his decision when the authorities that he deemed to be controlling and which are now admittedly wrong required him to focus on certain "economic disability facts" to the exclusion of "medical disability facts"?

It is respectfully submitted that the concept of upholding a fact finder's decision, based on substantial evidence, considering the record as a whole, presupposes a correct understanding of the relevant legal principles involved, and a reasoned determination of all relevant evidence within those parameters. It is wholly subservient of the judicial

review process to state that there was substantial evidence to support an ALJ where he is operating on erroneous legal premises in the first instance. *Anglo-Canadian Shipping Co. v. U.S.*, 264 F.2d 405 (9th Cir. 1959); *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

Indeed, it has long been held that an administrative order cannot be upheld unless the grounds upon which the agency acted were those upon which it relied. *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943); *Mississippi River Fuel Corp. v. Federal Power Commission*, 163 F.2d 433 (D.C. Cir. 1947); *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442 (7th Cir. 1975).

In summary then, where the basic underpinning for a decision on the question of what constitutes a previous disability is clearly erroneous, then the very essence of whether that disability was manifest or latent is likewise infected by the same infirmity; and it is neither appropriate nor consistent with Supreme Court precedent to simply state, as both the Benefits Review Board and Court of Appeals did here, that there was substantial evidence to support a lack of manifestness of Mr. Balderson's pre-existing pulmonary condition. The least that should have been done would have been to remand the §8(f) issue to the ALJ for further consideration in light of later case law, or, in a case as apparent as the present, it should have been ruled, as a matter of law, that §8(f) did apply as the court did in *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977).

In any event the reviewing authorities here departed from well established Supreme Court precedent on the

proper scope of judicial review, and this Court is respectfully urged to grant the writ of certiorari to remedy that injustice and to insure the continued vitality of correct administrative agency review processes.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2018 September Term, 1977

Maurice P. Foley Co., Inc., and
Hartford Accident & Indemnity Co.,
Petitioners,

v.

James Balderson, and Director,
Office of Workers' Compensation Programs,
United States Department of Labor,
Respondents.

BEFORE: MacKinnon and Robb, Circuit Judges; and Markey*, Chief Judge, U.S. Court of Customs and Patent Appeals.

O R D E R

Upon consideration of the petition for rehearing filed by petitioners herein, it is

ORDERED by the Court that petitioners' aforesaid petition is denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

[Filed Jan. 12, 1978]

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2018

MAURICE P. FOLEY CO., INC., AND HARTFORD ACCIDENT & INDEMNITY CO., PETITIONERS

v.

JAMES BALDERSON, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

Petition for Review of an Order of the Benefits Review Board

Argued November 21, 1977

Decided December 16, 1977

Judgment entered this date ←

John C. Duncan, III, for petitioners.

Joshua T. Gillelan, II, Attorney, Department of Labor, for respondent, Director, Office Workers' Compensation Programs.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Harry L. Sheinfeld also entered an appearance for Director, Office of Workers' Compensation Programs.

Mark L. Sheinfeld also entered an appearance for respondent.

Before MACKINNON and ROBB, *Circuit Judges*, and MARKEY,* *Chief Judge*, United States Court of Customs and Patent Appeals.

Opinion for the Court *Per Curiam*.

Per Curiam: This petition seeks to set aside an order of the Benefits Review Board ("Board") (J.A. 158) which affirmed the decision of the Administrative Law Judge ("ALJ") (J.A. 146) that § 8(f) of the Longshoremens' and Harbor Workers' Compensation Act, 33 U.S.C. § 908(f) (1970), did not relieve Hartford Accident & Indemnity Co. ("Hartford"), the workers' compensation carrier for Maurice P. Foley Co., Inc. ("Foley"), from the obligation to make compensation payments beyond 104 weeks to James Balderson, claimant and an employee of Foley. Section 8(f) is set out in the margin,[1] but in

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] Section 8(f) provides as follows:

§ 908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

* * * *

(f) Injury increasing disability:

(1) In any case in which an employee having an *existing permanent partial disability* suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subdivision (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an *existing permanent partial disability*, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subdivision (e)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

(2) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title.

33 U.S.C. § 908 (Supp. V 1975) (emphasis added).

pertinent part it provides that in any case in which an employee who has an "existing permanent partial dis-

ability" suffers an on-the-job injury which results in permanent total disability, the employer shall provide compensation payments to that employee for 104 weeks, after which the remainder of the compensation due to the employee shall be paid out of the Special Fund accumulated by payments from insurance carriers and self-insurers (*see* 33 U.S.C. § 944 (Supp. V 1975)).

The dispute in this case concerns from what source the compensation payments owed Balderson will be paid: if § 8(f) is applicable, benefits will be paid from the Special Fund, and Foley's carrier, Hartford, will not have to make any further payments. However, if § 8(f) is inapplicable, then Foley's carrier will be obligated to make payments beyond the 104-week period.

The standard by which we review administrative decisions under this Act is to reverse only if there is an error of law or when a finding of fact is unsupported by substantial evidence on the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976).[2] After careful consideration of petitioners' arguments, we conclude that substantial evidence supports the ALJ's findings and that no error of law was committed by the Board.

Balderson, who had been employed as a steam fitter for nearly twenty-three years, began employment with Foley in June, 1972. While in its employ, he was exposed to various air pollutants which exacerbated a

[2] Unlike boards which can, on the record developed by the ALJ, make independent findings of fact, 5 U.S.C. § 557(b) (1970), the Benefits Review Board is restricted to substantial evidence review, 33 U.S.C. § 921(b)(3) (Supp. V 1975). If the Board departs from that legal standard in reviewing the decision of the ALJ, we must reverse. Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, 542 F.2d 602, 608 (3d Cir. 1976).

chronic asthmatic and obstructive pulmonary condition. It was stipulated by the parties that Balderson is totally and permanently disabled as a result of severe pulmonary impairment caused by his exposure to pollutants while working for Foley (J.A. 2-4).

The ALJ held that § 8(f) was not applicable to this case. His decision was based on three grounds,[3] one of which was that any disabling condition Balderson had at the time of his hiring by Foley was not "manifest" to Foley. On appeal to the Benefits Review Board (under authority of 33 U.S.C. § 921(b) (Supp. V. 1975)), the ALJ's decision was affirmed on the sole ground that Balderson's condition was not "manifest" when Foley hired him. This petition to review the Board's decision

[3] The ALJ based his decision on three grounds. In addition to the point of whether the condition was "manifest" to the employer, the ALJ held (1) that Balderson did not have an "existing permanent partial disability" in an *economic* sense, as opposed to a medical sense, within the meaning of § 8(f) before he was exposed to the lung irritants while working for Foley; and (2) that, as a matter of law, when an employee's multi-year occupation exposures with various employers contributed to a chronic condition and his eventual permanent total disability, the last employer for whom he was working is liable in full for the compensable consequences of the injury (J.A. 146). The Board did not rely on these two grounds, and hence, we need not address ourselves to these issues. We do note, however, that the contention that Balderson did not have a disability in an *economic* sense would have no force in light of our decision in *C & P Telephone, supra*, where we joined the growing number of circuits rejecting the requirement that the disability exist in an "economic" as opposed to medical sense. *E.g.*, C & P Telephone Co. v. Director, Office of Workers' Compensation Programs, No. 76-1663, *decided* August 5, 1977, Slip Op. at 19-22; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1198 (5th Cir. 1977); Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, 542 F.2d 602, 609-09 (3d Cir. 1976).

is before this Court by authority of 33 U.S.C. § 921(c) (Supp. V 1975) which provides as follows:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of *that* order in the United States court of appeals for the circuit in which the injury occurred . . . .

(Emphasis added). Thus the issue before this Court is the propriety of the Board's determination that Balderson's condition was not "manifest" at the time of his hiring by Foley.

The purpose of § 8(f) prior to the 1972 amendments to the Act, 33 U.S.C. § 908(f) (1970), was explained by the Supreme Court in *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949), as "the prevention of employer discrimination against handicapped workers." This purpose has not been altered by the 1972 amendments (Pub. L. No. 92-576, 86 Stat. 1257, effective November 26, 1972). As explained by this court in *C & P Telephone Co. v. Director, Office Workers' Compensation Programs*, No. 76-1663, *decided* August 5, 1977,

> [T]he purpose of new § 8(f) is to prevent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for § 8(f). The Act makes the employer liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under § 8(f), the Act would discourage employers from hiring and retaining disabled workers.

Slip Op. 18-19. To effectuate this intent, prior cases have established that the preexisting disability must have been "manifest" to the employer before § 8(f) can be invoked. *E.g., Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs*, 542 F.2d 602, 609 (3d Cir. 1976); *Dillingham Corp. v. Massey*, 505 F.2d 1126, 1127 (9th Cir. 1974); *American Mutual Ins. Co. v. Jones*, 138 U.S.App.D.C. 269, 273-74, 426 F.2d 1263, 1267-68 (1970). As we explained in *C & P Telephone*,

> This requirement is consistent with the legislative intent because if the previous disability had not been manifest, the employer would have had no reason to discriminate against the handicapped person in hiring or firing.

Slip Op. at 23 n.10.

The determination of whether a condition is "manifest" or "latent" is a factual one which relies upon a number of factors. Courts have recognized that the critical element is what information the employer has available to him when the employee is hired. *Duluth, Missabe and Iron Range Ry. Co. v. U.S. Dept. of Labor*, 553 F.2d 1144, 1151 (8th Cir. 1977); *Dillingham Corp. v. Massey*, *supra*, at 1128. *See Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192, 1196-99 (5th Cir. 1977).

The Board cited references in the record to support its conclusion that substantial evidence supported the ALJ's decision on the "manifest" point (J.A. 161). Petitioners attack the Board's references and aver that those findings do not constitute substantial evidence (Pet. Br. 23-26). We disagree. We believe that substantial evidence does support the finding that the injury was not manifest; hence, the Board's decision was entirely proper.

The Board observed that claimant had always put in a full day's work notwithstanding his condition. Petitioners point to evidence that claimant missed work prior

to his employment with Foley. These absences were not so significant that the employer should have known of the extent of Balderson's condition. The Board also noted that claimant worked roughly the same number of hours in 1971 and 1972; this lends weight toward the finding that no circumstance existed which would render Balderson's condition manifest at the time of his hiring by Foley. The Board further observed that Balderson's 1972 medical discharge from the hospital stated that the claimant was able to continue his occupation of a steamfitter. Clearly, this is the type of factor which would tend to conceal the nature of Balderson's condition from his employer.

In addition, the Board noted that Foley did not give Balderson a medical examination. This fact lends weight to the conclusion that the employer did not appreciate the extent of the claimant's condition. The Board also made a separate finding that Foley did not know the seriousness of Balderson's breathing problems. The fact that a condition is manifest to a physician does not necessarily mean that the condition is manifest to the employer. *Dillingham v. Massey*, *supra*, at 1128. Finally, the Board observed that claimant was not given any special treatment which would allow the inference that Foley was aware of Balderson's condition.

Because substantial evidence supports the findings of the ALJ and because the Board committed no error of law upon review, we affirm the Board's decision.

So ordered.

APPENDIX C

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

JAMES BALDERSON, *Claimant*,	:	
v.	:	**Filed As Part of The Record Sept. 15, 1976** (date)
MAURICE P. FOLEY CO., INC. and HARTFORD ACCIDENT & INDEMNITY CO. Employer/Carrier-Respondents-Cross-Petitioners	:	Susan Rambo (Clerk) Benefits Review Board
	:	BRB Nos. 76-122 and 76-122A
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner-Cross-Respondent	:	DECISION

Appeals from the Decision and Order of Robert A. Briggs, Administrative Law Judge, United States Department of Labor.

Mark L. Schaffer (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

John C. Duncan, III, (McChesney & Pyne), Washington, D.C., for the employer/carrier.

Harry L. Sheinfeld and Joshua T. Gillelan, II, (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

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Hartman, Member:

These are appeals by the Director, Office of Workers' Compensation Programs, and the employer/carrier from a Decision and Order (76-DCWC-19) of Administrative Law Judge Robert A. Briggs pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, as extended to the District of Columbia, 36 D.C. Code §501, *et seq.* (hereafter referred to as the Act).

Claimant was employed as a steamfitter for nearly twenty-three years. Throughout his life, he has been troubled by asthma and in 1971 was found to have severe chronic obstructive pulmonary disease with respiratory insufficiency and hypercapnia. It was stipulated that the claimant is permanently totally disabled as a result of severe pulmonary impairment arising substantially from his exposure to noxious fumes and dust during his employment. The parties agree that claimant's condition rapidly deteriorated during his employment with Maurice P. Foley Co., his last employer, in 1972-1973. The sole issue presented before the administrative law judge was the applicability of the special fund pursuant to Section 8(f) of the Act to the facts of this case. 33 U.S.C. §908(f).

The administrative law judge held that Section 8(f) of the Act was not applicable. He ordered that employer/carrier pay claimant compensation for permanent total disability at the rate of $167 per week from March 7, 1973, and continuing. These payments were to be subject to adjustment increases pursuant to Sections 10 and 6(b) of the Act. 33 U.S.C. §§910, 906(b). The increases were ordered to be paid from the special fund and from appropriations pursuant to Section 10(h)(2) of the Act. 33 U.S.C. §910(h)(2).

Employer/carrier (hereafter, the employer) appeal contending that the administrative law judge erred in not finding the special fund to be applicable to the compensation payments. The Director, Office of Workers' Compensation Programs, (hereafter, the Director) appeals contending the administrative law judge committed error by limiting the compensation payable to the claimant to $167 a week, and assessing liability for the annual adjustments on the special fund and on appropriations under Section 10(h)(2) of the Act.

The purpose of the special fund is to encourage an employer to hire those he might not employ because of an existing handicap. Of course, knowledge of the characteristics upon which refusal to employ would be based is a pre-requisite for the application of the special fund. Accordingly, rather than determining the employer's actual knowledge, certain classes of disability have been defined as latent or manifest. *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). However, the determination as to whether a condition is latent or manifest is a factual one and cannot be disturbed if it is supported by substantial evidence. A worker's appearance, medical records, and experience are all relevant in deter-

mining whether a pre-existing condition is manifest to the employer.

Dillingham Corp. v. Massey, 505 F.2d 1126 (9th Cir. 1974).

The record supports the administrative law judge's finding that any disabling condition of the claimant was not manifest to the employer. Prior to his employment with Foley, claimant had always put in a full work day despite any breathing difficulties. Despite his breathing condition, he worked approximately the same number of hours in 1971 and 1972. Although treated for his breathing problems in 1972, his medical discharge from the hospital noted that the claimant was able to continue his occupation as a steamfitter. Further, Foley did not give claimant a physical examination at the time he was hired so as to indicate to employer the true nature of claimant's condition. Claimant while testifying that Foley knew of his asthma also indicated that there was no reason for Foley to know how serious his breathing problems were. Moreover, claimant was clearly not given any special treatment as to working conditions that would demonstrate that employer was aware of his breathing difficulties. Therefore, inasmuch as claimant's condition was not manifest to the employer at the time claimant was hired, Section 8(f) and the special fund would not apply to this case.

As concerns the Director's contention that claimant's compensation was improperly limited to $167 a week, the Board notes that the administrative law judge did not so limit the compensation. He properly found that claimant's compensation payments were to be adjusted pursuant to the phase-in ceilings provided by Section 6(b)(1) of the Act. 33 U.S.C. §906(b)(1). However, the Board finds that the administrative law judge erred in ordering that the

Section 6(b) and Section 10(f) adjustments were to be paid from the special fund and appropriations.

Section 6(b)(1) sets forth a four step phase-in procedure on maximum compensation payments. Section 6(d) of the Act, 33 U.S.C. §906(d), also provides that:

> Determination under this subsection with respect to a period shall apply to employees or survivors *currently receiving compensation for permanent total disability* or death benefits during such period, as well as those newly awarded compensation during such period. [emphasis added].

The statutory language indicates that claimant as a person "currently receiving compensation" (during the first period) is entitled to have his compensation adjusted during each compensation period under Section 6(b) to reflect the higher compensation limits.

Section 10(f) also provides that the compensation payments for permanent total disability are to be adjusted each year to reflect the percentage increase of the national average weekly wage. 33 U.S.C. §910(f). Section 10(h)(3) requires that these adjustments be applied to injuries occurring before the effective date to the amendments as well as to injuries occurring after the effective date. 33 U.S.C. §910(h)(3). Section 10(h)(2) provides that fifty percent of any additional compensation paid as a result of the adjustments under Section 10(h)(3) shall be paid from the special fund and fifty percent shall be paid from appropriations.

However, the special fund and appropriations are not liable either for Section 6(b) phase-in adjustments or for Section 10(f) adjustments for post-amendment injuries under Section 10(h)(2).

The Senate report noted:

> In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps. . . . . .

S. Rep. No. 92-1125, 92nd Cong. 2d Sess. (1972). However, nowhere was it mentioned that the special fund or appropriations under 10(h)(2) would pay for these Section 6(b) adjustments. In fact, Section 6 makes no reference whatsoever to Section 10(h)(2). Further, in response to a question before the House, it was stated that the only cost to the government of increasing the benefits would be 50 percent of the increase of benefits for those persons permanently disabled *prior* to the enactment of the bill. (emphasis added). Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 92nd Cong., 2d Sess., at 301 (1972).

Likewise, the special fund and appropriations under Section 10(h)(2) are not responsible for Section 10(f) adjustments for post-amendment injuries. Section 10(h)(2) clearly refers only to pre-amendment injuries. The committee report in describing subsection 10(h) notes only that the subsection provided that the adjustments in compensation for pre-amendment injuries shall be provided by the special fund and appropriations. S. Rep. No. 92-1125, *supra;* the omission of any reference to post-amendment injuries in the legislative history, and the statement in the House as to the cost of the amendments all make it clear that the employer is responsible both for Section 10(f) adjustments for post-amendment injuries and for Section 6(b) adjustments.

However, employer argues that because claimant was exposed to injurious stimuli prior to the amendments, the injury should be treated as a pre-amendment injury, and that therefore, the special fund and appropriations should be liable for the Section 10(f) adjustments. The parties stipulated before the administrative law judge, and he so found, that the injury took place in January 1973. The date of injury was an integral part of the case as that date would determine the rate of compensation claimant would receive. An admission of this character having been formally made for purpose of waiving certain proofs is clearly binding on the employer. 2 Jones on Evidence §13.34 (6th ed. 1958). Thus, this stipulation would likewise bind the employer on the Section 10(f) adjustment as well.

Accordingly, the Board modifies that part of the Decision that orders that Section 6(b) and 10(f) adjustments be paid from the special fund and appropriations to provide that the employer is responsible (1) for the adjustments under each of the phase-in limitations contained in 6(b)(1) and (2) for any appropriate adjustments pursuant to Section 10(f). In all other respects the Decision and Order appealed from is affirmed.

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur:

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 15th day of September, 1976.

SERVICE SHEET

BRB Nos. 76-122/122A: JAMES BALDERSON v. MAURICE P. FOLEY CO., INC. & HARTFORD ACCIDENT & INDEMNITY CO. & DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. (Case No. 76-DCWC-19)

A copy of this Decision has been sent to the following parties:

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APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	:	
JAMES W. BALDERSON,	:	
Claimant,	:	
v.	:	Case No. 76-DCWC-19
	:	
MAURICE P. FOLEY COMPANY, INC.,	:	OWCP NO. 40-73128
Employer,	:	
and	:	
HARTFORD ACCIDENT & INDEMNITY CO.,	:	
Carrier.	:	

[Received Dec. 18, 1975 D.C.C.A.]

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For the Employer and Carrier

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William J. Kilberg, Solicitor of Labor
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Washington, D.C. 20210

Before: ROBERT A. BRIGGS
Administrative Law Judge

- - - - - - - - - - - - - - -

DECISION AND ORDER

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, and Workmen's Compensation Act of the District of Columbia, as amended, 36 D.C. Code 501, *et seq.*, (the combined Acts hereinafter referred to as the Act), and the Rules and Regulations implementing said Act, 20 CFR Parts 701 and 702, a hearing in the above-captioned matter was held before the undersigned on October 21, 1975, at Washington, D.C.

All parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to call, examine and cross-examine witnesses. Thereafter, briefs, were filed which have been duly considered. Transcript pages are referenced by the letter "T" and Joint Exhibits by the letter "JX". The Employer/Carrier, is hereinafter referred to as Respondent. Counsel for Claimant has filed an application for attorney fees and costs pursuant to the regulations (20 CFR 702.132, *et seq.*).

Based upon the entire record herein, including the stipulations of fact by the parties and evidence adduced, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and order.

Issues

The issues presented for determination are whether Section 8(f) is applicable, and the liability of Respondent for attorney fees and costs.

Findings of Facts and Conclusions of Law

The parties have stipulated (JX.1), and I so find, that Claimant suffered an injury affecting his lungs and pulmonary system as a result of exposure to pollutants in January 1973 while working for Respondent, said injury arising out of and in the course of employment. Claimant first lost time from work due to the injury on March 7, 1973. He has not worked since and has been permanently and totally disabled since March 7, 1973. Claimant missed 18 hours from work between October 18, 1971 and March 7, 1972, due to lung and pulmonary problems. Both parties are subject to the Act and in compliance with applicable notice and filing requirements. Claimant's average weekly wage at the time of injury was $323.00 per week, entitling him to maximum compensation benefits of $167.00 per week. Compensation benefits have been paid at the rate of $167.00 per week for 104 weeks through March 4, 1975, in the total amount of $17,368.00. Respondent stopped payments on that date based on its position that payments beyond 104 weeks are payable from the Special Fund pursuant to Section 8(f). (JX.13)

Relevant background data. Claimant is 47 years old, has a ninth grade education and has worked as a steamfitter for approximately 23 years. His job duties require heavy manual labor, including the lifting of heavy items, bending and reaching (JX.3 at p.13). Claimant's breathing problem has deteriorated to the extent that he presently has an oxygen tank 24 hours per day. Getting dressed and putting his shoes on tires him out and he has to rest for 30 minutes; even walking a short distance to appear for the deposition was a major effort requiring him to rest several times in order to get his breath (JX.3 at p. 46, 56-57, 66). Claimant has had breathing problems due to asthma since he was 15 years old. At age 25, he started to notice that it was harder to climb steps but this was only when he had asthma which usually came on if he caught a cold. If the cold left, the asthma would disappear. He experienced an average of two asthma attacks per year.

Claimant first noticed a difference between the above problems and his present condition after he had been working for Respondent 2-3 months. Prior to this time, his breathing problems had not prevented him from doing his job (JX.3 at p. 21-23, 50-51). In this respect, Claimant stated (JX.3 at p. 50):

> When I first went to work there [for Respondent] I used to go up through the building and receive material up on the street and everything. When I first went to work there I'd go up – all the material was received upstairs and I'd go up steps, receive it and get our cherry picker up there and take it down. I'd also go up to the bathroom. And our office was upstairs. I carried the time up there every day. When I say "the office,"

we had one office downstairs. The architect's – I mean, the coordinator's office was upstairs. Trailer. And I was up all the time. Every bill of lading that we received, shipping bills, I made a copy of it on the copying machine on the floor up above. So, therefore, everything that come in, I'd go up and make a copy.

Toward the last that was out. Somebody else had to do that.

Joint Exhibit 11 shows that Claimant regularly worked a full five-day week for Respondent during the first six months of his employment (*i.e.*, from early June through late December 1972). Claimant was employed by Reeves & Webb from October 18, 1971 to March 7, 1972 (JX.-12) and for Respondent at the FBI Building from the week ending June 11, 1972, through the week ending March 4, 1973. During the interim period (March-June 1972), Claimant worked on the World Bank Building for Limbach Company (JX.3 at p. 25, 33).

Claimant's statement on or about December 1972 described the working environment at the FBI Building as follows (Encl. 5 of JX.2):

> For the last seven months, I have been working for Maurice P. Foley & Co., Inc. During this whole period of time, I was working in the second basement, and up until about three weeks ago, there were no fans to purify the air. All of this time while I was working in the basement, the workers were using mercury saws that were cutting metal, and there were small particles of metal in the air. There were also gasoline compressors, automobiles, trucks, welding

> machines. Until about a month ago, there was no ventilation in the basements, since the general contractor had closed over all openings. It was very hard to breath down there due to this condition. About a month ago, the government started bringing in automobiles to be used in the inauguration parade and at that time, they insisted that they have ventilation fans, since the air was so contaminated. (also JX.3 at p. 44)

Claimant further testified that he had had five episodes of acute bronchitis since March 1972, all of which occurred after he commenced work for Respondent (JX.3 at p. 43; JX.4 at p. 7). At the time of hiring with Respondent, Claimant believed Respondent knew about his asthma ("we're talking about asthma, whereas if I catch a cold that I'd have to lose some time from work") but not of his emphysema because Claimant did not know of this himself until he wasn't able to climb the steps at the FBI Building (JX.3 at p. 40, 41). Except for a five-day period in 1972 (March 8-12, 1972; also see JX.4 at p. 1) and excepting any periods due to work stoppages, Claimant did not recall losing any other time from work prior to commencing work for Respondent (JX.3 at p. 41, 42).

Claimant testified (JX.3 at p. 51-55) that he has been taking Norisodrine (a stimulant which loosens up congestion in the lungs) for at least 20 years. He might go for a month without using it and then he might use it every day for three or four days. Norisodrine is a powder and was contained in a small plastic apparatus with a mouthpiece which permitted inhalation of the powder. "If you had a bad cold and you had the stuff you stick up your nose to open your nose up, this would be the same thing."

Claimant believed Respondent was aware of his use of the Norisodrine. He concluded: "So there would be no reason for them to really notice it . . . it would be just like sticking a Vicks thing in your nose. So I don't know why it would really bring their attention" (JX.3 at p. 50-55). Claimant first had oxygen tanks installed at home "long after I went to work for Foley" (JX.3 at p. 19).

Medical evidence

a) A Pulmonary Function Study at Morris Cafritz Memorial Hospital dated *October 20, 1971* concluded: "Impression: Severe chronic obstructive pulmonary disease with respiratory insufficiency and hypercapnea" (Encl. 4 of JX.2).

b) *The Discharge Summary* from Morris Cafritz on March 12, 1972, noted that Claimant had been followed for six months for severe fixed chronic pulmonary disease, that "he was able to continue his occupation as a steamfitter", and that he "was discharged markedly improved on the 4th hospital day" with the discharge diagnosis of chronic obstructive lung disease (JX.4 at p. 1).

c) *Dr. Laz*, who is Board certified and a specialist in pulmonary diseases, has been Claimant's treating physician since 1971. His report of April 26, 1973 (JX.4 at p. 7) concludes:

> Impressions: 1. Severe chronic obstructive pulmonary disease. 2. Respiratory insufficiency. 3. Chronic cor pulmonale.
>
> Discussion: At this time it is no longer possible for Mr. Balderson to continue any form of work activity. It is my opinion that his long exposure to pulmonary irritants and toxins has contributed

> significantly to his development of severe chronic obstructive pulmonary disease. Furthermore, there appears to have been, over the past two years some rapid deterioration in his condition, which I feel also was contributed to by his occupational exposures.

d) *Report of roentgen findings* dated *May 21, 1973* (JX.5 at p.3) indicated "a degree of emphysema". The report concludes:

> Comparison of these with films made elsewhere dated 9/27/72, and 1/8/73, show that there is some suggestion that the emphysema is progressive, although this is not a completely reliable observation.

e) *Dr. Canter*, Chief of the Pulmonary Disease Section at Georgetown University examined Claimant on *June 14, 1973*, including reviews of prior chest radiographs and pulmonary function tests. As herein pertinent, his report stated (JX.6):

> When a patient has reached this stage of irreversible chronic obstructive pulmonary disease with respiratory failure it is difficult to say how much of his disability may be related to his occupational exposure. However, in my opinion, his exposure to dusts, fumes, asbestos, paints, cuttings from copper pipes, use of mercury-carbon saws, and other potential irritants associated with his work as a steamfitter has contributed significantly to his present condition. This is not to deny that he may have a background of bronchial asthma, but it is unusual for asthma to lead to this type of pulmonary

function impairment. Furthermore, his chest radiographs reveal roentgen evidence of emphysema, namely, increased retrosternal air space, flattened diaphragm and regions of hyperlucency . . . .

In summary, I think Mr. Balderson has severe, irreversible chronic obstructive pulmonary disease, due to chronic bronchitis and emphysema, possibly developing on a background of bronchial asthma and contributed to by his occupational exposure. He is permanently and totally disabled.

1. *Section 8(f) is not applicable.* The Benefits Review Board has consistently held that pre-existing conditions "not shown to be in any way disabling *in an economic sense* (emphasis supplied) prior to the [injury at issue] do not constitute an "existing permanent partial disability" within the meaning of Section 8(f) of the Act." *Aleksiejczyk v. Atlantic and Gulf Stevedores*, 1 BRBS 541 (1975); *Shillington v. W.J. Jones & Son*, 1 BRBS 191 (1974).

In *Burke v. Metropolitan Stevedore Co.*, 2 BRBS 94 (1975), the Benefits Review Board stated:

"The term "disability," as it is used in Section 8(f), includes both an employment-related disability and one unrelated to employment. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949). However, in construing the term "disability" as it is used in Section 8(f), it has been held that "disability" is an economic and not a medical concept. *American Mutual Insurance Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). The record does not support a contention that the Claimant was disabled in an economic sense prior to the injury which gave

rise to this case. Prior physical infirmities suffered by the Claimant are merely pre-existing conditions, not previous disabilities, so that Section 8(f), limiting the employer's liability for payment of compensation, does not apply."

In the instant case, Claimant worked approximately the same number of hours in 1971 as 1972 (1840 and 1824 hours, respectively). During the first six months of his employment with Respondent (June-December 1972) he regularly worked a full five-day week. The Hospital Discharge Summary from Morris Cafritz dated March 12, 1972, noted that Claimant was able to continue his occupation as a steamfitter and was discharged as markedly improved on the 4th hospital day.

Nor does it appear that *any disabling condition was manifest* to Respondent *at the time of initial employment* in June 1972. Cf. *U.S. Fidelity & Guaranty Co. v. O'Keefe*, 240 F. Supp. 813 (1962). The parties have stipulated that Claimant did not have a physical examination at the time he was employed by Respondent (JX.1 at p. 2). At the start and for the first 2-3 months of his employment with Respondent, Claimant was able to perform his work and did not experience any severe difficulties (JX.3 at p. 50, 51). As noted, he worked a full five-day week for the first six months through late December 1972. Claimant was not aware that he had emphysema until some time after commencing work for Respondent (JX. 3 at p. 40, 41). Both Drs. Canter and Laz were of the opinion that Claimant's occupational exposures *contributed*, in combination with his underlyirg chronic lung condition, to his present total disablement.

It is well-settled that the employer during the last employment in which a Claimant was exposed to injurious stimuli, prior to the date when he became aware of the

fact that he was suffering from an occupational disease arising out of his employment, is liable for the full amount of the award. *Aerojet - General Shipyards, Inc. v. O'Keefe*, 413 F.2d 793 (1969); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (1955).

2. *Attorney fees and costs.* Section 28 of the Act provides for the award of "a reasonable attorney's fee." The regulations (20 CFR 702.132) provide that "any fee approved shall be *reasonably commensurate with the actual necessary* work performed . . ." (emphasis supplied). In arriving at a reasonable fee, it is necessary not only to consider the hours expended, but also the complexity of the issues involved, the result obtained, the experience and expertise of counsel, prevailing rates in the community for similar services, and the quality of service rendered. Understandably, an experienced attorney in *workmen's compensation* proceedings would probably charge a higher rate but require less research and pre-trial preparation time than a less experienced attorney who would charge a somewhat lower rate but require more time. It is also recognized that, although a hearing may be of relatively brief duration, competent Counsel frequently resolve substantial portions of their case prior to trial and that pre-trial matters may be of equal, and sometimes greater, significance ultimately. Time at trial may also be saved by submission of evidence by deposition and stipulation.

The request of Counsel for Claimant for a fee in the amount of $2,000 for legal services is not questioned by Respondent and is a reasonable sum for the legal services rendered. Cf. *Linnell Choate & Webber v. Heyde*, 330 F. Supp. 170 (1971); *Schlosberg v. Continental Baking Co.*, BRB No. 104-73 (June 1, 1973). All services were rendered subsequent to November 26, 1972, and, accordingly,

are assessed against the employer and carrier pursuant to Section 28 of the Act.

All computations provided for herein are to be made by the Deputy Commissioner in accordance with the terms of this Decision and Order, and applicable provisions of the Act and Regulations. All computations set forth herein are subject to verification by the Deputy Commissioner.

ORDER

1. Respondent shall pay Claimant, James W. Balderson, compensation for permanent total disability in bi-weekly installments at the rate of $167.00 per week from March 7, 1973, *and continuing until further ordered*, subject to any applicable administrative adjustment increases pursuant to Section 10 and 6(b) of the Act, which adjustment increases would be payable from the special fund and appropriations in accordance with Section 10(h)(2). The accrued part of this award from March 7, 1973, through the date of this order, including interest on accrued compensation payments due at the rate of six percent per annum computed from the date each payment was due, shall be paid in a lump sum, *provided* that any compensation payments made to Claimant on account of his disability shall be offset and deducted from such lump sum.

2. Respondent shall pay or reimburse Claimant as appropriate, for the reasonable cost of such necessary diagnostic, medical and surgical care and treatment as the nature of his injury and the process of recovery has or may require in the future, pursuant to Section 7 of the Act.

3. Respondent shall pay directly to Mark L. Schaffer, Esq., the sum of $2,000 for legal services rendered on behalf of Claimant.

/s/ ROBERT A. BRIGGS
Robert A. Briggs
Administrative Law Judge

Dated: December 11, 1975
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on December 18, 1975, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. James W. Balderson, 906 Palmer Road, Oxon Hill, Md. 20022
Claimant

Hartford Accident and Indemnity Company
100 North Pitt Street, Alexandria, Virginia 22314
Insurance Carrier on Employer (if self-insured)

Mark L. Schaffer, Esquire, 925 15th Street, N.W., Washington, D.C. 20005

John C. Duncan, III, Esquire, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036

A copy was also mailed by regular mail to the following:

Judge Robert A. Briggs, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

/s/ JACK GARRELL
Jack Garrell
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT
STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

FILED
JUN 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-1417

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAURICE P. FOLEY COMPANY, INC., ET AL., PETITIONERS

v.

JAMES BALDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

JOSHUA T. GILLELAN II,
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Department of Labor,
Washington, D.C. 20210.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 569 F. 2d 132. The opinion of the Benefits Review Board (Pet. App. 11a-19a) is reported at 4 B.R.B.S. 401. The decision and order of the administrative law judge (Pet. App. 20a-32a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. A petition for rehearing was denied on January 12, 1978. The petition for a writ of certiorari was filed on April 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the administrative law judge's determination that the respondent employee's disability was not "manifest" at the time he was hired.

STATEMENT

Respondent Balderson had worked as a steamfitter for almost 23 years when he was hired by petitioner Foley in June 1972. Prior to his employment with Foley, Balderson had been troubled by asthma and an obstructive pulmonary condition (Pet. App. 6a-7a), but his condition had not interfered significantly with his ability to perform his job (Pet. App. 14a). During the year Balderson worked for Foley, however, he was exposed to a variety of noxious fumes and dust. For that reason, his condition deteriorated rapidly, and by March 1973 Balderson had developed a severe pulmonary impairment that left him totally and permanently disabled (Pet. App. 7a, 12a).

After leaving his job, Balderson applied for workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.*, which has been adopted as the statutory workers' compensation scheme for the District of Columbia, 36 D.C. Code 501. The sole issue before the administrative law judge was whether, under Section 8(f) of the Act, 33 U.S.C. (Supp. V) 908(f), petitioners should be relieved of the obligation to make further payments to Balderson. Under Section 8(f), as the courts have construed it, an employer is not obligated to pay benefits to a disabled employee for more than 104 weeks if the employee had "an existing permanent partial disability" that was "manifest" to the employer at the time the employee was

hired. *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, 553 F. 2d 1144, 1151 (C.A. 8); *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, 542 F. 2d 602, 609 (C.A. 3); *American Mutual Insurance Co.* v. *Jones*, 426 F. 2d 1263, 1267-1268 (C.A. D.C.).

The administrative law judge held Section 8(f) inapplicable because, he concluded, any pre-existing disability Balderson may have had was not "manifest" to Foley at the time Balderson was hired (Pet. App. 29a).[1] The Benefits Review Board affirmed, holding that even if Balderson's previous lung condition was properly termed a "disability," the record supported the finding that the disability was not manifest to Foley when Balderson was hired (Pet. App. 13a-14a).

The court of appeals affirmed the Board's ruling. Applying the settled principle that the determination whether a condition is "manifest" or "latent" turns on "what information the employer has available to him when the employee is hired," the court held that substantial evidence supported the Board's factual finding that "no circumstance existed which would render Balderson's condition manifest at the time of his hiring by Foley" (Pet. App. 9a-10a).

ARGUMENT

Petitioners contend (Pet. 16-22) that the court of appeals applied an incorrect legal standard in reviewing the Board's finding that Balderson's condition was "latent" rather than "manifest."

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[1]The administrative law judge also concluded that Section 8(f) was inapplicable because Balderson's condition did not constitute an economic disability and because his employment with Foley merely aggravated a condition arising out of his prior employment (Pet. App. 7a n. 3, 28a-30a). Those grounds were not relied upon by the Board or the court of appeals and are therefore not at issue here.

The test whether a condition is manifest is, as the courts have uniformly held, objective: regardless of what an employer actually knew regarding the employee's disability, a condition is deemed "manifest" if the condition was objectively apparent from the information available to the employer at the time the claimant was hired. See *Equitable Equipment Co.* v. *Hardy*, 558 F. 2d 1192, 1196-1199 (C.A. 5); *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, *supra*, 553 F. 2d at 1151; *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, *supra*, 542 F. 2d at 609; *Dillingham Corp.* v. *Massey*, 505 F. 2d 1126, 1128 (C.A. 9); *American Mutual Insurance Co.* v. *Jones*, *supra*, 426 F. 2d at 1267-1268. Contrary to petitioners' contention, the court of appeals followed this unbroken line of precedent and applied an objective test in this case. Citing several of these cases, the court correctly stated the test as turning on "what information the employer has available to him when the employee is hired" (Pet. App. 9a). Similarly, the court noted that nothing in Balderson's employment history was indicative of a pulmonary disability to a degree that the employer "should have known of the extent of Balderson's condition" (Pet. App. 10a). The court further observed that Foley was not aware of Balderson's condition (Pet. App. 10a), a point of obvious evidentiary significance in supporting the conclusion that Balderson's condition was not objectively manifest. But, as its opinion makes clear, the court did not rely on this factor alone in upholding the administrative law judge's finding that Balderson's disability was not manifest.[2]

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[2]Like the court of appeals, the Board similarly recognized that the proper test of "manifestness" is objective (Pet. App. 13a).

Petitioners further contend (Pet. 24-25) that the Fifth and Eighth Circuits have improperly rejected the objective test of "manifestness" as well. Again, there is no basis for this assertion. The cases cited by petitioner demonstrate that those courts have followed the well-settled "objective" test first set out in *American Mutual Insurance Co.* v. *Jones*, *supra*, 426 F. 2d at 1267-1268. See *Equitable Equipment Co.* v. *Hardy*, *supra*, 558 F. 2d at 1196-1199; *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, *supra*, 553 F. 2d at 1151.

Finally, petitioners argue (Pet. 25-30) that the decision of the Benefits Review Board is not entitled to the customary deference of the "substantial evidence" test because the administrative law judge made an error of law in the alternative ground he gave for his decision. The administrative law judge concluded both that Balderson's condition was not "manifest" and that it was not a "disability" within the meaning of Section 8(f) because it was not disabling in an economic sense. Whatever the status of the second conclusion as a matter of law,[3] it had no effect on the first conclusion. The determination that a condition is latent rather than manifest is wholly independent of the determination whether the condition is a disability, as the Board's opinion demonstrates. The Board affirmed the finding that the condition was latent, without having to reach the question whether the condition was a "disability" within the meaning of the Act. The administrative law judge's conclusion that Balderson's

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[3]The courts that have considered the matter have held that "disability" is not limited to "economic disability." *C & P Telephone Co.* v. *Director, Office of Workers' Compensation Programs*, 564 F. 2d 503 (C.A. D.C.); *Equitable Equipment Co.* v. *Hardy*, *supra*, 558 F. 2d at 1198; *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, *supra*.

condition was not a "disability" therefore had no effect on the determination of the court of appeals that there was substantial evidence in the record to support the Board's conclusion that Balderson's condition was not "manifest."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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